84-189

No.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

STEPHANIE ERON,

Petitioner,

vs.

CITY OF MEQUON, TIMOTHY BRAATEN, RICHARD SCHNELL and JACK HOCKINSON and JOHN DOE and RICHARD ROE,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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2704

QUESTION PRESENTED FOR REVIEW

Did the Warrantless and Non-Consensual Entry By Mequon Police Officers Into The Business Establishment of the Plaintiff, While Said Premises Were Closed to the General Public, And the Subsequent Arrest of Petitioner Violate the Fourth Amendment to the Constitution of the United States as a Matter of Law for Purposes of a Civil Action Prosecuted on Behalf of the Female Owner/Proprietor for Injuries Sustained During the Arrest?

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In the
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OCTOBER TERM, 1984

NO.

STEPHANIE ERON,

Petitioner,

VS.

CITY OF MEQUON, TIMOTHY BRAATEN, RICHARD SCHNELL and JACK HOCKINSON and JOHN DOE and RICHARD ROE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit filed May 9, 1984.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was filed May 9, 1984 and is set forth in the appendix, pages App. 1-7.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

City of Mequon, Wisconsin, police officers made a warrantless and non-consensual entry onto the premises of the petitioner's business establishment after those premises had been closed and locked to the general public in Mequon, Wisconsin, on December 8, 1980. After going onto the curtilage of petitioner and peering into a shuttered, but not completely closed window, the officers observed the petitioner and three other individuals inside the locked restaurant. Believing that he was observing what he referred to as a liquor license violation, one of the officers called upon other Mequon police officers to join him in his continuing surveillance of the premises. The officers knocked repeatedly on the locked door of the restaurant seeking admittance. When one of the petitioner's employees finally answered the door the police officers, over her objection, entered the restaurant where they found the petitioner and the other individuals engaged in cleaning up the kitchen. The petitioner vocally protested this warrantless and non-consensual entry into her private property. After a vocal exchange between the petitioner and the police, petitioner was violently handcuffed, causing her arm to be broken, and along with another male employee was arrested by the Mequon police officers for obstructing their investigation of the alleged liquor license violation. She subsequently commenced a civil action for damages in the United States District Court for the Eastern District of Wisconsin under 42 U.S.C. 1983. Following a trial to a jury, the defendant police officials were found not liable for using excessive force in arresting the petitioner and the jury also found that there was no illegal entry into the petitioner's premises. Prior to submission of the

special verdict to the jury the petitioner had requested the trial court to answer the first question on the special verdict in the affirmative as a matter of law. The trial court refused. The petitioner subsequently moved for a new trial and the trial court denied the motion. Petitioner took an appeal to the Seventh Circuit Court of Appeals. The Court of Appeals for the Seventh Circuit, in an unpublished Order, affirmed and adopted as its own the decision of the trial court. It is from this decision of the United States Court of Appeals for the Seventh Circuit, filed May 9, 1984, that the petitioner now requests the United States Supreme Court to grant this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE CASE FURNISHES THE UNITED STATES SUPREME COURT THE OPPORTUNITY TO DECIDE THAT A WARRANTLESS AND NON-CONSENSUAL ENTRY BY POLICE OFFICERS INTO A PRIVATELY OWNED BUSINESS ESTABLISHMENT WHEN CLOSED TO THE GENERAL PUBLIC VIOLATES THE FOURTH AMENDMENT TO THE CONSTITUTION AS A MATTER OF LAW IN THE ABSENCE OF EXIGENT CIRCUMSTANCES IN THE CONTEXT OF CIVIL LITIGATION STEMMING FROM THE SEARCH.

The Court of Appeals' decision affirming the decision of the trial court which held that the petitioner's position was contrary to law, and allowed the jury to determine that there was no illegal entry into petitioner's business premises by the Mequon police officers runs squarely counter to this Court's decisions requiring a warrant before an individual's reasonable expectation of privacy in his person, papers and effects can be violated. This Court has long recognized that a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests, and not simply those interests found inside the four walls of the home. *United States* v. *Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977).

The basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials; the officials may be health, fire, or building inspectors, their purpose may

be to locate and abate a suspected public nuisance, or simply to perform routine periodic inspection, and the privacy that is invaded may be sheltered by the walls of a warehouse or other commercial establishment not open to the public. *Michigan* v. *Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978).

Moreover, prior decisions of this Court have emphasized that exceptions to the warrant requirement are "few in number and carefully delineated." *United States* v. *United States District Court*, 407 U.S. 297 (1972). As this Court said in its recent decision in *Welsh* v. *Wisconsin*, ... U.S. ....., 80 L.Ed.2d 732, 104 S.Ct. ..... (1984), "[t]he police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Id.* The statement of Justice Jackson, writing in concurrence in *McDonald* v. *United States*, 335 U.S. 451 (1948), that:

> "[W]hether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it. . . . It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it." *Id.*, at 459-460 (Jackson, J., concurring).

is directly in point where, as in the instant case, an illegal entry is made onto private property and a business establishment, closed to the general public, is entered without the consent of the owner/proprietor and without the benefit of a warrant merely on the suspicion of a zealous police officer that a liquor license violation was possibly taking place inside. As this Court said in *Welsh* v. *Wisconsin*, ... U.S. ....., 80 L.Ed.2d 732, 104 S.Ct. ..... (1984)

> "Consistently with this approach, the lower courts have looked to the nature of the underlying offense as an important factor to be considered in the exigent circumstances calculus. . . . [i]t is sufficient to note that many other lower courts have also considered the gravity of the offense an important part of their constitutional analysis. *Id.*

It is clear that the Fourth Amendment protects people, not places. *Katz* v. *United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. *Id.* Moreover, whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends on the facts and circumstances of each case. *Cooper* v. *California,* 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967). What the Fourth Amendment protects against unwarranted governmental intrusion is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. *Hoffa* v. *United States,* 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966).

It is important to note that whether an employee can give a valid consent to a search of his employer's premises depends upon the scope of his/her authority. Generally, the courts have been of the view that the average employee, such as a clerk, janitor, driver, or other person temporarily in charge, may not give consent. *U.S.* v. *Lagow,* 66 F.Supp. 738 (S.D.N.Y. 1946). However, if the employee is a manager or other person of considerable authority who is left in complete charge for a substantial period of time, then the prevailing view is that such a person can waive his employer's rights. *U.S.* v. *Antonelli Fireworks Co.,* 155 F.2d 631 (2d Cir. 1946). Only where effective consent is given may a search be conducted with-

out a warrant and without probable cause. Most federal courts have said that consent to search "is not lightly to be inferred." *Rosenthall* v. *Henderson,* 389 F.2d 514 (6th Cir. 1968). Certainly the voluntary nature of the consent to entry into the premises must appear incredulous where, as in the instant case, the officer, by his own admission, describes how he and other officers gained entry without the consent of the party who opened the door for them:

> "[a]t approximately 2:15 A.M. the doors opened and we were greeted by the white female in the long dark dress. She had in her hand a glass with a dark liquid that resembled Coca Cola. We did not check the contents. She asked us what we wanted and we advised her that we wanted to speak with Mrs. Eron and determine what was occurring within the bar and to see if violations were still occurring. *She advised us not to enter because we did not have a warrant, however she did not physically restrain or attempt to restrain our movement.* As we passed the bar from the main entrance I looked at the bar top and observed it was cleared of the paraphenalia I originally observed, and that the people were elsewhere." [Emphasis added]. (Defendants' Exhibit 101, p. 4, App. 11) (Tr. p. 228)

It is more than clear from Defendant's Exhibit 101, referred to above, that the entry into the premises was not made with the voluntary consent of the employee who opened the door to the officers. Therefore, it would not come under the voluntary consent exception to the warrant requirements set forth by this Court in *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973). The trial court should have found that there was illegal entry as a matter of law and its failure to do so is reversible error. The Court of Appeals for the Seventh Circuit, by adopting the decision of the trial court as its decision, has also committed prejudicial error. This Court should grant the petition for a Writ of Certiorari and reverse the judgment of the lower court.

CONCLUSION

It is respectfully submitted that the Supreme Court should declare the warrantless and non-consensual entry into the premises of the petitioner's business establishment while closed to the general public illegal as a matter of law and in violation of the rights guaranteed by the Fourth Amendment to the Constitution in the context of civil litigation stemming from the illegal entry. The Supreme Court should grant the Petition for Certiorari and reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

SUTTON & KELLY

By: ROBERT E. SUTTON

Attorneys for Petitioner

APPENDIX

APPENDIX A

Unpublished Per Curiam Order
JUDGMENT—WITHOUT ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
May 9, 1984.
Before
Hon. William J. Bauer, Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Luther M. Swygert, Senior Circuit Judge

STEPHANIE ERON,

Plaintiff-Appellant,

No. 83-2285 vs.

CITY OF MEQUON, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 81 C 1302
Judge Myron L. Gordon

This cause came before the Court for decision on the record from the United States Court for the Eastern District of Wisconsin, ... Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

UNPUBLISHED ORDER NOT TO BE CITED
PER CIRCUIT RULE 35

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(SUBMITTED APRIL 4, 1984)*

May 9, 1984

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. LUTHER M. SWYGERT, Senior Circuit Judge

No. 83-2285

STEPHANIE ERON, Plaintiff-Appellant,

vs.

CITY OF MEQUON, et al., Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 81-C-1302.
Myron L. Gordon, Senior Judge.

ORDER

Plaintiff brought suit pursuant to 42 U.S.C. § 1983 against the City of Mequon, Wisconsin, its police chief

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs sand record.

and several of its police officers. She alleged that the defendants caused her to be falsely arrested and that, in carrying out the arrest, the police officers entered her place of business illegally and used excessive force. Her arm was broken in the incident. A trial was held, and the jury returned a special verdict finding that there was no illegal entry into the plaintiff's premises and that excessive force was not used. On appeal, the plaintiff cites two errors: 1) the trial court's refusal to require an affirmative answer to the first question, which concerned illegal entry, and 2) the trial court's denial of plaintiff's motion for a new trial.

The focus of both grounds for appeal is the plaintiff's contention that, as a matter of law, the police officers entered into plaintiff's business without consent or other authorization. This court has reviewed the transcript of the trial and all documents submitted by both parties. We find that the district court fully and accurately addressed this issue when denying plaintiff's motion for a new trial. Consequently, we adopt that decision, a copy of which is attached, as the decision of this court.

AFFIRMED

UNITED STATES DISTRICT COURT
EASTER DISTRICT OF WISCONSIN

No. 81-C-1302

STEPHANIE ERON,

Plaintiff,

v.

CITY OF MEQUON, et al.,

Defendants.

DECISION and ORDER

The plaintiff in this action has moved for a new trial. The motion will be denied.

The plaintiff sought relief under 42 U.S.C. § 1983 for alleged violations of her constitutional rights by police officers who entered her restaurant to investigate suspected liquor law violations and allegedly used excessive force when they arrested her for obstructing their investigation. The jury found against the plaintiff on the issues of illegal entry and excessive force.

The plaintiff challenges as contrary to law the jury's determination that there was no illegal entry and asserts that the court should have found that there was an illegal entry as a matter of law. The plaintiff claims that "on the evidence it was undisputed that the entry was through a locked door without a warrant and that the police were requested on more than one occasion to vacate the premises." Since none of the exceptions to the 4th amendment's warrant requirement apply, according to the plaintiff, the warrantless entry was illegal.

There are two problems with the plaintiff's argument. First, the plaintiff mischaracterizes the evidence when she states that entry was "through a locked door." The door

to the restaurant was locked when the police first arrived on the scene. However, the evidence was clear that the police did not break the door down; rather, they knocked repeatedly, and eventually the door was unlocked and opened to them by Michelle Michaels, a waitress at the restaurant.

Second, the plaintiff''s list of exceptions to the warrant requirement is incomplete in that it does not include cases where consent is given to entry on and search of private premises—an exception to the warrant requirement that is clearly recognized in the case law. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); Vale v. Louisiana, 399 U.S. 30, 35 (1970). The question whether consent has been given to a search is generally a question of fact. *Schneckloth*, 412 U.S. at 248-49; United States v. Sells, 496 F.2d 912, 914 (7th Cir. 1974); United States v. Young, 471 F.2d 109, 111 (7th Cir. 1972). In this case, I continue to believe, as I did at the time of trial, that the evidence concerning consent was in conflict and that the issue was properly left to the jury as the trier of fact. I also believe that there was ample evidence to support the jury's determination that the plaintiff, through her agent Michelle Michaels, did in fact consent to the police officers' entry into the restaurant.

The evidence at trial included a tape recording made by one of the officers as the incident in question was occurring; the tape demonstrated that the officers knocked repeatedly at the door of the restaurant. The door was eventually opened by Ms. Michaels. The officers asked where Mrs. Eron was; Ms. Michaels said she was in the kitchen.

There was some conflict in the evidence as to what happened next, i.e., whether the officers proceeded to the kit-

chen by "barging in" despite Ms. Michaels' protests or whether they peacefully followed Ms. Michaels to the kitchen. However, there was substantial evidence to support the latter version of events. As indicated by the transcript of the tape it was only later, after one of Mrs. Eron's employees had already refused to cooperate with the officers and had given his name as "Joe Blow," that the officers were asked to leave the premises.

The jury was instructed that they should decide the issue of consent by looking at the circumstances of the officers' entry into the restaurant, including such matters as representations made by the officers and protestations, if any, made by the plaintiff or her agents. The plaintiff made no objection to these instructions. Given the evidence as summarized earlier and the governing principles of law, the jury's determination that there was no illegal entry was clearly not against the weight of the evidence. *See* United States v. Griffin, 530 F.2d 739 (7th Cir. 1976) (consent can be shown by words, gesture, or conduct); *Sells*, 496 F.2d at 914 (when a third party consents to search, question is whether he or she reasonably appeared to the officers to have authority to consent); *Young*, 471 F.2d at 111 (defendant's attempted rescission of consent when it appeared search might incriminate him did not render original consent invalid).

The plaintiff argues that "in view of the warrantless entry," her arrest and the alleged use of excessive force were unlawful as "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471 (1963). Given my determination regarding the question of illegal entry, this argument is without force. The plaintiff offers no other reason to upset the jury's finding that there was no use of excessive force. In my opinion that finding had support

in the evidence and may not be disturbed. I also see no necessity to grant a new trial "in the interest of justice" as requested by the plaintiff.

Therefore, IT IS ORDERED that the plaintiff's motion for a new trial be and hereby is denied.

Dated at Milwaukee, Wisconsin, this 9 day of June, 1983.

/s/ *Myron L. Gordon*
Senior U. S. District Judge

APPENDIX B

MEQUON, WISCONSIN
POLICE DEPARTMENT
Liquor Law Violation
Complaint No. 45818
Monday, December 8, 1980, 2:04 AM

We (Ptm Schnell and myself) responded to the Eron's Club Riversite Restaurant at 11040 N. Cedarburg at the Advise of Sgt Hockinson who observed numerous vehicles still parked in the lot. This situation is not customary, in that, it is usual to see the parking lot at the Eron's Club Riversite cleared soon after the 1:00 AM closing hour. Upon arrival at the Piggly Wiggly Shopping center at Hwy 57 and Hwy 167 I observed Ptm Schnell to be parked and observing the restaurant from the entrance to the shopping center. I asked him if he saw any activity from the building. He advised he saw nothing out of the ordinary. I advised Ptm Schnell that I intended to park my squad and walk to the window area and look into the restaurant and make a visual determination if any violations were occurring or if the status within the premises was stable. I parked my squad along N. Cedarburg Road approximately ½ block south of the restaurant. I walked from the squad after notifying the station that I would be on portable radio. I proceeded to the western extremity of the building, that which faces N. Cedarburg road and is set back from same approximately 50 feet. I observed five vehicles still parked in the lot, namely, a Jeep, a Firebird, another Firebird, a Riviera and parked along side the garbageloading dock and partially hidden from view a late model Buick midsize auto. The above listed vehicles were parked in the order listed from west to east and along side the south extremity of the building. I walked to the west side of the building and observed 5 windows that

would allow visual observation within into the bar area and the dining area of the restaurant. The third window from the right on the west side was partially opened approximately 2 inches.

The opening that I covered on the previous page consisted of a partial separation of the top and bottom Lat Curtain. All the lat curtains on the other windows were closed except the one to the dining area on the north face. View of the bar from the dining area is obstructed by a wall. As I looked within the bar area from the third window I could hear a noise best described a being a thump followed by the clicking noise of several objects on some hard surface. The initial thump was a hollow sound much like clapping cupped hands together. I then observed four people within the bar three seated at same and a man behind the bar. The man behind the bar was going thru the motions and mannerisms of what I perceive as being a bartender. He would walk from one person to another and was cleaning what appeared to be a glass with a white towel. The party closest to me and at the west end of the bar I immediately identified as Mrs Stephanie Eron. I am acquainted with Mrs Eron from past dealings and police business. Mrs Eron was seated with her left shoulder facing me and on occasion would turn enough so that I was able to identify her. In front of Mrs Eron was a long stemmed bulb type glass. The glass was approximately 8 inches high and contained a crushed ice and white liquid mixture. She drank from same. To Mrs Eron's left was a white female with shoulder length brown hair. She was wearing a full length dark dress. She had in front of her the same long stemmed bulb type glass with the crushed ice and white (clear) liquid mixture. On the end of the bar was a white male in a blue plaid shirt wearing a cowboy hat. The noise I initially heard on my arrival was determined to be the sound of bar dice being played. In

front of the man with the cowboy hat I observed a Pilsner glase with a golden liquid within.

The golden liquid I observed appeared to be beer. The following information was as I trasmitted to the station via the hand held radio. The bar area was approximately 20 feet from my outside vantage point and I observed the violation within the bar with what appeared to be 3 sources of inside illumination. The first and most prominent source of light was an overhead flood light that was aimed down and towards the west wall, and somewhat southerly. The second light source I observed was a small candle type electrical light that which resembles a candle and gives off an orange-type light. The third light source I observed was a small bright light that illuminated mainly the cash register, however, it appeared to diffuse and illumniate the surrounding area somewhat. The light afforded by the flood lamp seemed to eminate from behind the parties at the bar.

I called for Sgt Hockinson and advised him that closing hours violations were occurring within the premises and asked him to come to the scene. He arrived momentarily and together with Ptm Schnell we next attempted to gain entrance. Sgt Hockinson instructed Ptm Schnell to stand at the vantage window and observe the occupants and their activity as we knocked at the door and identified ourselves as police. At this point Sgt Hockinson rapped the door. Sgt Hockinson and myself alternately would knock at the door as Ptm Schnell maintained his view at the window. The people within made no attempt to acknowledge our presence. Ptm Schnell began to rap on the window to the bar area and he advised at this point that they were cleaning up the bar and afterwards the people left the area and walked out from the bar to another area of the restaurant. They did not answer the door.

Sgt Hocksinson walked the length of the south wall of the building. The south wall or the south side of the building houses the galley or food preparation area of the restaurant. The wall is brick type with 3 glass windows spaced along the length of the wall. From the windows I heard rock type music being played in the background and voices were discernable. On one occasion I heard a male voice state "Its the police out there", and then a reply in a female voice "No, I think its the health inspector", and then the voice began laughing. A different female voice at this time responede "Let the fuckers stand out there". I was standing midway the length of the south wall beneath the window area of the building. Sgt Hockinson walked back to the door (Main Entrance) and for a moment we discussed what our next movement would be and at approximately 2:15 AM the doors opened and we were greeted by the white female in the long dark dress. She had in her hand a glass with a dark liquid that resembled Coca Cola. We did not check the contents. She asked us what we wanted and we advised her that we wanted to speak with Mrs Eron and determine what was occurring within the bar and to see if violations were still occurring. She advised us not to enter because we did not have a warrant, however, she did not physicall restrain or attempt to restrain our movement. As we passed the bar from the main entrance I looked at the bar top and observed it was cleared of the paraphenalia I originally observed, and that the people were elsewhere. I identified the young woman who allowed us to enter as the one that was sitting next to Mrs Eron initially and whe was later identified as Ms Michelle K. Michaels of 10748 N. Cedarburg Rd., an employee.

We asked Ms Michaels where the rest of the group was and she directed us to the galley. We followed her and

walked into the galley and asked Mrs Eron to explain the violation that had been occurring at the bar earlier. Mrs Eron stated that there was no violations at her bar earlier. I observed the man who I observed earlier with the blue plaid shirt squatting near a refrigerator placing food items within, and next to him was the cowboy hat he had been wearing earlier. He was identified as being Donald R. Heiden 8224 N. 48th St. Brown Deer, Wisc. Ptm Schnell asked the man I recognized as being the bar tender for identification. Ptm Schnell asked him his name to which he replied "Joe Blow". Ptm Schnell asked him again and he replied once again "Joe Blow". Mrs Eron started be become very agitated and hostile. She began walking between officers and employees shouting loudly that they (herself and employees) did not have to comply with us or cooperate with us. She ordered us off the premises and ordered her employees not to cooperate with us. We attempted to gain identity information from the other woman, who incidently, refused to give us that information. We advised the man who claimed he Joe Blow once again for identification and he refused and walked away from us. Mr Eron was yelling encouragement to the unidentified man and also interjected the encouragement with obscenities towards us, those of which included you fucking pigs and punk ass bitches. At this point we advised the man if he didn't comply with our orders we would arrest him for resistance to officers. Mrs Eron demanded that she be arrested also. Her face became reddened at this point and her manner was highly agitated, as she would dart quickly from one cooking station to another screaming obscentities and making threats.

She began moving between the officers and employees more fervantly at this point and began grabbing items such as knives and walked between Ptm Schnell and myself (as we were interrogating the unknown man). At this

point she grabbed a large bar ash tray and smashed it on the floor of the galley. As she threw the ashtray to the floor she struck me in the left arm. The expression on her face resembled very much the expression on the faces of people that I have assisted in the past for very severe hysterical outbursts, many of which have been hospitalized. Her eyes were watery and her mouth was drawn back baring her teeth. Se maintained her obscene epithets and dared us to arrest her and then demanded us to arrest her. She advised us that she wanted to interfere and maintained her orders to her employees to resist. At this point we advised Mrs Eron she was indeed under arrest and that she was to come with us. Mrs Eron became now, defiant and pulled away from Sgt Hockinson. She assumed a defensive position with clenched fists, knees bent, recembling a boxer. She was taken from the galley area and cuffed and placed in the squad car for transportation. Ptm Schnell and myself restrained the unknown man from the galley and cuffed him transporting him to the station. At the station he advised us his name was David A. Welzien of 1491 E. Cedar Ln. Grafton, Wisc. Mr. Welzien was arrested for Resistance to Officers and posted a cash bond.

Reporting Officer: Thomas P. Luzinski

Status: Closed

Supervisor Approving: Sgt. Hockinson

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FILED
AUG 30 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-189

In the Supreme Court of the United States

OCTOBER TERM, 1984

STEPHANIE ERON,

Petitioner,

vs.

CITY OF MEQUON, TIMOTHY BRAATEN, RICHARD SCHNELL and JACK HOCKINSON and JOHN DOE and RICHARD ROE,

Respondents,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals for the Seventh Circuit commit reversible error by affirming the decision of the trial court that the legality of the respondents' entry onto petitioner's premises was a question of fact, and therefore, not illegal as a matter of law?

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In the
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-189

STEPHANIE ERON,

Petitioner,

VS.

CITY OF MEQUON, TIMOTHY BRAATEN, RICHARD SCHNELL and JACK HOCKINSON and JOHN DOE and RICHARD ROE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, City of Mequon, et al respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Seventh Circuit, filed May 9, 1984.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was filed May 9, 1984 and is set forth in the Appendix (A-1 - A-6).

STATEMENT OF THE CASE

Petitioner is the owner of a restaurant located in Mequon, Wisconsin. She sought relief under 42 U.S.C. 1983 for alleged violations of her constitutional rights by respondent police officers who entered her restarant to investigate suspected liquor law violations and arrested her for obstructing their investigation.

Trial before a jury was held on January 3 and 4, 1983. After the close of all the evidence and settlement on a special verdict to be presented to the jury, the plaintiff moved the trial court to answer the first question—whether respondents' entry onto petitioner's premises was illegal—"yes", based on the contention that there was no factual dispute concerning the circumstances of the entry. The trial court refused and submitted that question to the jury with the other questions. The jury returned a verdict against the petitioner on all questions. On motion after verdict, the petitioner repeated her claim that entry was illegal as a matter of law and requested a new trial. (A-7 - A-8). The trial court denied the motion by decision rendered January 9, 1983. (A-3 - A-6). From the decision and the verdict of the jury, the petitioner appealed to the United States Court of Appeals for the Seventh Circuit which affirmed and adopted as its own the decision of the trial court (A-1 - A-6). Petitioner prays that a writ of certiorari issue to review the Court of Appeal's decision to affirm the trial court's refusal to rule that respondents' entry onto her premises was illegal as a matter of law.

REASON FOR DENYING WRIT

The Legality Of Respondents' Entry Onto Petitioner's Premises Was A Question Of Fact And The Court Of Appeals Did Not Commit Reversible Error In Affirming The Trial Court's Decision To Submit Such Issue To The Jury

As the issue of whether respondents' entry onto petitioner's premises was consensual in nature constituted a question of fact, the trial court was correct in submitting the question to the jury. Petitioner wrests a few sentences from one trial exhibit out of the context of two days of trial proceedings to lend credence to her assertion that there was no factual dispute with regard to the legality of respondents' entry onto her premises. In doing so, petitioner not only mischaracterizes the timing of petitioner's and her agents' objection to the officers' presence on the premises, but she also disregards ample evidence supportive of the jury determination that the entry was consensual.

A tape recording made of the incident by one of the investigating officers was admitted into evidence and demonstrated that the officers did not merely force their way into the restaurant, but knocked repeatedly on the front door before petitioner's agent, Michelle Michaels, granted them access. (Tr. p. 152-53). Further, the testimony of one of the investigating officers, Thomas Luzinski, indicated that after petitioner's employee opened the door to the officers, she guided them to petitioner inside the restaurant.

> Q: And after the door was opened, can you tell us what was said between yourself and Miss Michaels?

A: I informed her that we wanted to speak to Mrs. Eron. We asked where Mrs. Eron was. Miss Michaels said, 'She's in the kitchen.'
Q: And then what happened after that?
A: We proceeded to the kitchen.

(Tr. pp. 100-101).

The tape recording of the incident reveals that it was only later, after petitioner's employee had led the officers to petitioner, and petitioner and her employees refused to cooperate with the officers, did petitioner order the officers to leave the premises (Tr. pp. 153-55). Clearly, once petitioner consented to the officers' entry, she could not subsequently rescind such consent because she did not want to cooperate with the officers. *United States* v. *Young,* 471 F.2d 109, 111 (7th Cir. 1972).

The question of whether consent has been given to a search is usually a question for the trier of fact. *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 222 (1973). In view of the testimony from Michaels that—contrary to what the tape recording of the incident revealed had actually transpired—she protested the police presence prior to petitioner's obstructive behavior in the restaurant kitchen area, the trial court correctly deemed the consent issue a question of fact.

Petitioner raises for the first time the question of whether it was within Michaels' authority to consent to respondents' entry. Absent exceptional circumstances, a reviewing court should not consider contentions not presented in the lower court. *Moore* v. *Illinois,* 408 U.S. 786 (1972); *Hormel* v. *Helvering,* 32 U.S. 552 (1941). Further, as the trial court's decision correctly noted, "when a third-party consents to search, question is whether he or she reasonably appeared to the officers to have authority to consent, *Young,* 471 F.2d at 111." (A.-5). And the question of whether an agent has the appearance to consent to a search is a question of fact. *United States* v.

Sells, 496 F.2d 912, 914 (7th Cir. 1974). Quite obviously, the trial court was correct in submitting the entire consent question to the jury.

As the foregoing demonstrates, the premise upon which petitioner's entire argument rests—that the entry was illegal as a matter of law—is based upon a misapprehension relative to the evidence adduced at trial. The erroneous premise renders petitioner's argument—largely a discourse on the purpose of the fourth amendment—irrelevant. Because of the presence of evidence indicating consensual entry, evidence the jury ultimately found persuasive, the trial court was compelled to send the issue to the jury for their consideration. The Court of Appeals in turn, recognizing that the trial record presented a question of fact with regard to the consensual entry issue, was compelled to confirm the trial court's refusal to transform a question of fact into a question of law.

CONCLUSION

Petitioner would not only have this court reweigh the facts presented in the trial record, but at the same time ignore, as she does, the ample evidence supporting the jury's determination that entry was consensual. The trial court refused to so usurp the role of the trier of fact, and the Court of Appeals recognized the propriety of the trial court's decision to so refuse.

In light of the above, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

BORGELT, POWELL, PETERSON & FRAUEN, S.C.

JOSEPH D. MCDEVITT
(Attorney of Record)
JAMES S. SMITH

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(SUBMITTED APRIL 4, 1984)*

May 9, 1984

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. LUTHER M. SWYGERT, Senior Circuit Judge

No. 83-2285

STEPHANIE ERON,

Plaintiff-Appellant,

vs.

CITY OF MEQUON, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 81-C-1302.
Myron L. Gordon, *Senior Judge.*

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

ORDER

Plaintiff brought suit pursuant to 42 U.S.C. § 1983 against the City of Mequon, Wisconsin, its police chief and several of its police officers. She alleged that the defendants caused her to be falsely arrested and that, in carrying out the arrest, the police officers entered her place of business illegally and used excessive force. Her arm was broken in the incident. A trial was held, and the jury retured a special verdict finding that there was no illegal entry into the plaintiff's premises and that excessive force was not used. On appeal, the plaintiff cites two errors: 1) the trial court's refusal to require an affirmative answer to the first question, which concerned illegal entry, and 2) the trial court's denial of plaintiff's motion for a new trial.

The focus of both grounds for appeal is the plaintiff's contention that, as a matter of law, the police officers entered into plaintiff's business without consent or other authorization. This court has reviewed the transcript of the trial and all documents submitted by both parties. We find that the district court fully and accurately addressed this issue when denying plaintiff's motion for a new trial. Consequently, we adopt that decision, a copy of which is attached, as the decision of this court.

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 81-C-1302

STEPHANIE ERON,

Plaintiff,

v.

CITY OF MEQUON, et al.,

Defendants.

DECISION and ORDER

The plaintiff in this action has moved for a new trial. The motion will be denied.

The plaintiff sought relief under 42 U.S.C. § 1983 for alleged violations of her constitutional rights by police officers who entered her restaurant to investigate suspected liquor law violations and allegedly used excessive force when they arrested her for obstructing their investigation. The jury found against the plaintiff on the issues of illegal entry and excessive force.

The plaintiff challenges as contrary to law the jury's determination that there was no illegal entry and asserts that the court should have found that there was an illegal entry as a matter of law. The plaintiff claims that "on the evidence it was undisputed that the entry was through a locked door without a warrant and that the police were requested on more than one occasion to vacate the premises." Since none of the exceptions to the 4th amendment's warrant requirement apply, according to the plaintiff, the warrantless entry was illegal.

There are two problems with the plaintiff's argument. First, the plaintiff mischaracterizes the evidence when she states that entry was "through a locked door." The door to the restaurant was locked when the police first arrived on the scene. However, the evidence was clear that the police did not break the door down; rather, they knocked repeatedly, and eventually the door was unlocked and opened to them by Michelle Michaels, a waitress at the restaurant.

Second, the plaintiff's list of exceptions to the warrant requirement is incomplete in that it does not include cases where consent is given to entry on and search of private premises—an exception to the warrant requirement that is clearly recognized in the case law. *See, e.g.,* Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); Vale v. Louisiana, 399 U.S. 30, 35 (1970). The question whether consent has been given to a search is generally a question of fact. *Schneckloth,* 412 U.S. at 248-49; United States v. Sells, 496 F.2d 912, 914 (7th Cir. 1974); United States v. Young, 471 F.2d 109, 111 (7th Cir. 1972). In this case, I continue to believe, as I did at the time of trial, that the evidence concerning consent was in conflict and that the issue was properly left to the jury as the trier of fact. I also believe that there was ample evidence to support the jury's determination that the plaintiff, through her agent Michelle Michaels, did in fact consent to the police officers' entry into the restaurant.

The evidence at trial included a tape recording made by one of the officers as the incident in question was occurring; the tape demonstrated that the officers knocked repeatedly at the door of the restaurant. The door was eventually opened by Ms. Michaels. The officers asked where Mrs. Eron was; Ms. Michaels said she was in the kitchen.

There was some conflict in the evidence as to what happened next, i.e., whether the officers proceeded to the kitchen by "barging in" despite Ms. Michaels' protests or whether they peacefully followed Ms. Michaels to the kitchen. However, there was substantial evidence to support the latter version of events. As indicated by the transcript of the tape it was only later, after one of Mrs. Eron's employees had already refused to cooperate with the officers and had given his name as "Joe Blow," that the officers were asked to leave the premises.

The jury was instructed that they should decide the issue of consent by looking at the circumstances of the officers' entry into the restaurant, including such matters as representations made by the officers and protestations, if any, made by the plaintiff or her agents. The plaintiff made no objection to these instructions. Given the evidence as summarized earlier and the governing principles of law, the jury's determination that there was no illegal entry was clearly not against the weight of the evidence. *See* United States v. Griffin, 530 F.2d 739 (7th Cir. 1976) (consent can be shown by words, gesture, or conduct); *Sells*, 496 F.2d at 914 (when a third party consents to search, question is whether he or she reasonably appeared to the officers to have authority to consent); *Young*, 471 F.2d at 111 (defendant's attempted rescission of consent when it appeared search might incriminate him did not render original consent invalid).

The plaintiff argues that "in view of the warrantless entry," her arrest and the alleged use of excessive force were unlawful as "fruit of the posionous tree." Wong Sun v. United States, 371 U.S. 471 (1963). Given my determination regarding the question of illegal entry, this argument is without force. The plaintiff offers no other reason to upset the jury's finding that there was no use

of excessive force. In my opinion that finding had support in the evidence and may not be disturbed. I also see no necessity to grant a new trial "in the interest of justice" as requested by the plaintiff.

Therefore, IT IS ORDERED that the plaintiff's motion for a new trial be and hereby is denied.

Dated at Milwaukee, Wisconsin, this 9 day of June, 1983.

/s/ *Myron L. Gordon*
Senior U. S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action
Case No. 81-C-1302

STEPHANIE ERON,

Plaintiff,

vs.

CITY OF MEQUON, TIMOTHY BRAATEN, Individually and in his official capacity as Chief of Police of the City of Mequon, RICHARD SCHNELL and JACK HOCKINSON and JOHN DOE and RICHARD ROE, individually and in their official capacities as police officers of the City of Mequon Police Department,

Defendants.

MOTION FOR NEW TRIAL

NOW COMES the plaintiff Stephanie Eron by her attorneys, Robert E. Sutton and Walter F. Kelly, pursuant to Rule 59 of the Federal Rules of Civil Procedure and moves the Court for a new trial for the following reasons:

1. The answer to Question 1 of the Special Verdict is contrary to law and the trial court erred in failing to answer the question yes;

2. The verdict with respect to answers to all the questions is contrary to the weight of the evidence; and

3. In the interests of justice.

Dated at Milwaukee, Wisconsin, January 11, 1983.

SUTTON & KELLY

By /s/ *Robert E. Sutton*
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